

XO Communications, Inc.

11111 Sunset Hills Road
Reston, VA 20190
USA



November 25, 2002

Ms. Magalie Roman Salas
Secretary, Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

Ex Parte Presentation

RE: WC Docket 02-306, Application by SBC Pacific for Authorization to Provide In-Region, InterLATA Services in California

Dear Ms. Salas:

Pursuant to the requirements of Sections 1.1200 et seq. of the Commission's rules, you are hereby notified on behalf of XO Communications, Inc and XO California, Inc. that Gerry Salemme, Senior Vice President – External Affairs and the undersigned met with Jeffrey Carlisle, Richard Lerner, Scott Bergmann, Rhonda Lien, Aaron Goldschmidt, Renee Crittendon and John Stanley of the Wireline Competition Bureau on November 22, 2002 regarding several aspects of SBC Pacific's application to provide In-Region, InterLATA services in California.

In particular, we discussed XO's view that SBC Pacific's offer of interim DS3 pricing is illusory. Consequently, SBC Pacific's application is impossible to grant in its current state because SBC Pacific is not in compliance with the obligations imposed by checklist item 2 regarding UNE pricing for both DS1 and DS3 loops. We provided copies of: 1) SBC Pacific's latest proposed interim rate DS3 loop amendment; and 2) SBC Pacific's amendment offering a DS1 and DS3 true up. These documents are attached. Please do not hesitate to contact me should you have any questions regarding this filing.

Sincerely,

A handwritten signature in cursive script that reads "Cathleen Massey". To the right of the signature is a small, stylized mark that appears to be "1/21".

Cathleen Massey
Vice President, External Affairs

Enc.

cc: Jeffrey Carlisle
Scott Bgergman
Aaron Goldschmidt
John Stanley

Richard Lerner
Rhonda Lien
Renee Crittendon

**AMENDMENT TO
INTERCONNECTION AGREEMENT**

BETWEEN

**PACIFIC BELL TELEPHONE COMPANY d/b/a
SBC PACIFIC BELL TELEPHONE COMPANY**

AND

[CLEC NAME]

WHEREAS, Pacific Bell Telephone Company d/b/a SBC Pacific Bell Telephone Company ("Pacific"), formerly Pacific Bell and [CLEC NAME] ("CLEC") ("collectively referred to as the "Parties") entered into an Interconnection Agreement which became effective on [INSERT EFFECTIVE DATE] ("the Agreement");

WHEREAS, the Agreement permits the Parties to mutually amend the Agreement in writing;

WHEREAS, for purposes of Pacific's federal 271 application for California pending before the Federal Communications Commission ("FCC"), in WC Docket No. 02-306, for approval to provide in-state interLATA service pursuant to 47 U.S.C. §271, Pacific is making available to CLECs in California a certain interim DS3 Unbundled Network Element ("UNE") Loop recurring rate, as set forth below, upon the terms and conditions set forth herein;

WHEREAS, pursuant to Resolution ALJ 181, this Amendment will become effective, absent rejection of the advice letter by the Commission, thirty (30) days after the filing date of the Advice Letter to which this amendment ("Amendment") is appended ("Amendment Effective Date");

WHEREAS, this Amendment shall only be available to those CLECs in California who have or obtain the Amendment for Interim Rate DS1/DS3 Loops Amendment, previously announced by Pacific in Accessible Letter CLECC02-267;

NOW THEREFORE, the Parties agree to amend the Agreement based upon the following terms and conditions:

(1) The Agreement is hereby amended to replace the recurring rate for a DS3 UNE Loop currently set forth in such Agreement with the following interim recurring rate for a DS3 UNE Loop, effective as of the Amendment Effective Date:

Interim DS3 UNE Loop Recurring Rate (statewide average rate only): \$573.20

(2) This Amendment shall not modify the nonrecurring rate for the DS3 UNE Loop currently set forth in the Agreement, but rather, such nonrecurring rate shall continue to apply to the DS3 UNE Loop.

(3) For any DS3 UNE Loops CLEC has in service on the Amendment Effective Date, the interim DS3 UNE Loop recurring rate set forth above in this Amendment shall be effective between the Parties as of the Amendment Effective Date.¹ Pacific will calculate and apply to CLEC's bill any applicable credits or charges due CLEC as a result of such pricing change.

¹ Notwithstanding anything to the contrary in the Agreement (including, as applicable, this Amendment and any other Amendments to the Agreement ("Agreement")), in the event that any other telecommunications carrier should adopt provisions in the Agreement pursuant to Section 252(i) of the Act ("Adopting CLEC") after the effective date of a particular rate change, that rate change shall only apply prospectively beginning from the date that the MFN provisions becomes effective between Pacific and the Adopting CLEC following the Commission's order approving the Adopting CLECs Section 252(i) adoption or, the date such Agreement is deemed approved by operation of law ("Section 252(i) Effective Date"), and that rate change would not in any manner apply retroactively prior to the Section 252(i) Effective Date.

(4) The Parties agree that any billing adjustments and payments made in accordance with this Amendment are not subject to Pacific's obligations under the Service Performance Measurements and that liquidated damages shall not apply to any adjustment or credits made in connection with this Amendment and will not be included in or affect any past, current or future performance measurement results.

(5) The Term and Termination provisions set forth in the Agreement shall not apply to the rates, terms and conditions being incorporated into the Agreement by this Amendment. Rather, this Amendment, including the interim DS3 UNE Loop recurring rate set forth herein, will automatically terminate the earlier of: (1) the date the CPUC approves an interim or final DS3 UNE Loop recurring rate in Application 01-02-024/A.01-02-035, the CPUC's Unbundled Network Element (UNE) Reexamination for Pacific Bell Telephone Company, at which time the interim DS3 UNE Loop recurring rate set forth in this Amendment would automatically be replaced by the DS3 UNE Loop recurring rate established by the CPUC in such proceeding, subject to any appeals and associated review, and the Parties would engage in a true-up of the Commission-established DS3 UNE Loop recurring rate(s) retroactive to September 20, 2002, as to any DS3 UNE Loops that CLEC had in service during such true-up period (i.e., the true-up would be based upon the difference between the final Commission-established DS3 UNE Loop recurring rate and the recurring rate(s) paid by CLEC for DS3 UNE Loops during the true-up period), including the payment of refunds or recovery of surcharges, as applicable;² or (2) upon the effective date of any regulatory or judicial action, finding and/or order, including but not limited to by the FCC in its pending Notice of Proposed Rulemaking, *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 01-361 (rel. Dec. 20, 2001) ("Triennial Review UNE rulemaking") finding that Loops or DS3 Loops are no longer a UNE. In the event of such action or order, Pacific will not be obligated by this Agreement or Amendment to provide DS3 UNE Loops, including but not limited to the DS3 UNE Loop terms and conditions and the nonrecurring DS3 UNE Loop rate set forth in the Agreement or the interim DS3 UNE Loop recurring rate set forth in this Amendment, but rather, any such obligations shall automatically terminate upon the effective date of any such action or order, at which time the DS3 UNE Loop (including the nonrecurring rate) set forth in the Agreement and the interim DS3 UNE Loop recurring rate set forth in this Amendment would be converted to the applicable DS3 Fiber Advantage Channel Termination rates, terms and conditions set forth in Pacific's C.P.U.C. No. 175-T Tariff if 90% or more of the traffic carried over the DS3 UNE Loop is jurisdictionally intrastate traffic, or Pacific's FCC No. 1 Tariff if more than 10% of the traffic carried over the DS3 UNE Loop is jurisdictionally interstate traffic, unless otherwise ordered or directed by the FCC in its Triennial Review UNE rulemaking. In the event of any such conversion(s), all applicable charges shall apply. ~~In addition, following any such conversion(s), the Parties shall engage in a true-up of the interim DS3 UNE Loop recurring rate set forth in this Amendment retroactive to the Rate Effective Date set forth in this Amendment, including the payment of refunds or recovery of surcharges, as applicable.~~

(6) The Parties acknowledge and agree that the rates set forth in this Amendment are each legitimately related to, conditioned on and consideration for, every other term and condition in this Amendment.

(7) EXCEPT AS MODIFIED HEREIN, ALL OTHER TERMS AND CONDITIONS IN THE UNDERLYING AGREEMENT REMAIN UNCHANGED.

(8) Notwithstanding any other change of law provision in the Agreement, the Parties acknowledge and agree that in entering this Amendment neither Party is waiving any of its rights, remedies or arguments with respect to any orders, decisions or proceedings and any remands thereof, including but not limited to its rights under the United States Supreme Court's opinion in *Verizon v. FCC*, 535 U.S. ____ (2002); the D.C. Circuit's decision in *United States Telecom Association, et. al v. FCC*, No. 00-101 (May 24, 2002); the FCC's Order *In the Matter of the Local Competition Provisions of the Telecommunications Act of 1996*, (FCC 99-370) (rel. November 24, 1999), including

² In the event the CPUC first establishes interim DS3 UNE Loop recurring rate(s) in Application 01-02-024/A.01-02-035, then upon the CPUC's establishment of a final DS3 UNE Loop recurring rate(s), the final DS3 UNE Loop recurring rate(s) shall be retroactively true-up back to September 20, 2002, as to any DS3 UNE Loops that CLEC had in service during such true-up period (i.e., the true-up would be based upon the difference between the final Commission-established DS3 UNE Loop recurring rate and the recurring rate(s) paid by CLEC for DS3 UNE Loops during the true-up period).

its Supplemental Order Clarification (FCC 00-183) (rel. June 2, 2000) in CC Docket 96-98; or the FCC's Order on Remand and Report and Order in CC Dockets No. 96-98 and 99-68 (the "ISP Intercarrier Compensation Order") (rel. April 27, 2001), which was remanded in *WorldCom, Inc. v. FCC*, No. 01-1218 (D.C. Cir. 2002). Rather, in entering into this Amendment, each Party fully reserves all of its rights, remedies and arguments with respect to any decisions, orders or proceedings, including but not limited to its right to dispute whether any UNEs and/or UNE combinations identified in the Agreement and this Amendment must be provided under Sections 251(c)(3) and 251(d) of the Act, and under this Agreement. The Parties further acknowledge that they have executed an amendment superseding certain compensation, interconnection and trunking terms ("Reciprocal Compensation Amendment"). Until the expiration of such Reciprocal Compensation Amendment, the Parties agree not to exercise their intervening law rights for any reciprocal compensation, point of interconnection or trunking requirements that are subject to the Reciprocal Compensation Amendment. By executing this Amendment, neither Party waives any of its rights that it may have at the time of, or that arise after, the expiration of the Reciprocal Compensation Amendment and expressly reserve all of their respective rights, under the ISP Intercarrier Compensation Order, or any other regulatory, legislative or judicial action. In the event that the FCC, a state regulatory agency or a court of competent jurisdiction, in any proceeding, including without limitation, in the FCC's Notice of Proposed Rulemaking, *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 01-361 (rel. Dec. 20, 2001) ("Triennial Review UNE rulemaking"), finds, rules and/or otherwise orders that any of the UNEs and/or UNE combinations provided for under this Agreement and this Amendment do not meet the necessary and impair standards set forth in Section 251(d)(2) of the Act, the affected provision will be immediately invalidated, modified or stayed as required to effectuate the subject order upon written request of either Party. In such event, the Parties shall have sixty (60) days from the effective date of the order to attempt to negotiate and arrive at an agreement on the appropriate conforming modifications required to the Agreement. If the Parties are unable to agree upon the conforming modifications required within sixty (60) days from the effective date of the order, any disputes between the Parties concerning the interpretations of the actions required or the provisions affected by such order shall be handled under the Dispute Resolution Procedures set forth in this Agreement.

IN WITNESS WHEREOF, the Parties hereto have caused this Amendment to be executed in triplicate on the date(s) shown below by their respective duly authorized representatives.

CLEC

**Pacific Bell Telephone Company d/b/a
SBC Pacific Bell Telephone Company
By SBC Telecommunications, Inc.,
its authorized agent**

By: _____

By: _____

Name: _____
(Print or Type)

Name: _____
(Print or Type)

Title: _____
(Print or Type)

Title: ^{For/} President-Industry Markets

Date: _____

Date: _____

AECN/OCN # _____

AMENDMENT
TO INTERCONNECTION AGREEMENT
BETWEEN
SBC PACIFIC BELL TELEPHONE COMPANY
AND
[CLEC NAME]

WHEREAS, SBC Pacific Bell Telephone Company ("Pacific"), formerly Pacific Bell and [CLEC NAME] ("CLEC") entered into an Interconnection Agreement which became effective on [INSERT EFFECTIVE DATE] ("the Agreement"); and

WHEREAS, the Agreement permits the Parties to mutually amend the Agreement in writing; and

WHEREAS, Pacific has agreed in the context of its state 271 proceeding (R. 93-04-003/I. 93-04-002; R. 95-04-043/I. 95-04-044) pending before the California Public Utilities Commission ("CPUC") and its application to the FCC for approval to provide in-state interLATA service pursuant to 47 U.S.C. §271 to make available to CLECs certain DS1 and DS3 UNE Loop rates, as set forth below, upon certain terms and conditions;

NOW THEREFORE, the Parties agree to amend the Agreement to incorporate such rates subject to the following terms and conditions:

1. The Appendix Pricing – Attachment A to the Agreement is hereby amended to reflect the parties agreement to treat DS1 and DS3 UNE Loop Rates contained in the underlying agreement, and set forth in Sections (2) and (3), below, as interim, pursuant to the terms and conditions outlined below. The rates set forth in this Amendment shall be effective as of the date Pacific files its application to the FCC for approval to provide in-state interLATA service pursuant to 47 U.S.C. §271.
2. DS1 Loop: Zone 1 -- \$ 90.27, Zone 2 -- \$98.23, Zone 3 -- \$119.50
3. DS3 Loop (no geographic deaveraged rates): \$1837.18
4. In the event there is regulatory or judicial action during the term of the Amendment resulting in a determination that Loops or DS1 Loops or DS3 Loops are no longer a UNE, Pacific will not be obligated by this Amendment to provide DS1/DS3 UNE Loops.

5. The Term set forth in the Agreement shall not apply to the rates, terms and conditions being incorporated into the Agreement by this Amendment. Rather, the terms of this Amendment, including the DS1 and DS3 UNE Loop Rates, will expire on the date the CPUC approves DS1 and DS3 UNE Loop Rates in Proceeding A.01-02-024/A.01-02-035, Consolidated 2001/2002 Unbundled Network Element (UNE) Reexamination for Pacific Bell Telephone Company. At that time, the interim DS1 and DS3 UNE Loop rates set forth in this Amendment will be automatically replaced by the rates established by the CPUC, and the Parties shall engage in a true-up of the rates retroactive to the Effective Date of this Amendment, including the payment of refunds or recovery of surcharges, as applicable.
6. The Parties acknowledge and agree that the Rates set forth in this Amendment are each legitimately related to, conditioned on and consideration for, every other term and condition in this Amendment.
7. **EXCEPT AS MODIFIED HEREIN, ALL OTHER TERMS AND CONDITIONS IN THE UNDERLYING AGREEMENT REMAIN UNCHANGED**, and all such terms and conditions are hereby incorporated by reference and the Parties hereby reaffirm the terms and provisions thereof.
8. The Parties understand and agree that by entering into this Amendment, neither Party is waiving any rights it may have under the intervening law language of the underlying Agreement but instead, each Party reserves all of its rights in that regard.

IN WITNESS WHEREOF, the Parties hereto have caused this Amendment to be executed on the date shown below by their respective duly authorized representatives.

*** SBC PACIFIC BELL TELEPHONE COMPANY**
By: SBC Telecommunications, Inc.,
its authorized agent

CLEC

By: _____

By: _____

Print Name: _____

Print Name: _____

President - Industry Markets

Title: _____

Date Signed: _____

Date Signed: _____

OCN #: _____

*On January 25, 1999, the United States Supreme Court issued its opinion in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) (and on remand *Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. 2000) and *Ameritech v. FCC*, No. 98-1381, 1999 WL 116994, 1999 Lexis 3671 (June 1, 1999) and on appeal to and remand by the United States Supreme Court, *Verizon v. FCC*, et. al, 535 U.S. __ (2002)). The Parties further acknowledge that on May 24, 2002, the United States Court of Appeals for the District of Columbia Circuit issued its decision in *United States Telecom Association, et. al v. FCC*, No. 00-101, in which the Court granted the petitions for review of the Federal Communications Commission's ("FCC") Third Report and Order and Fourth Further Notice of Proposed Rulemaking in CC Docket No. 96-98 (FCC 99-238) ("the UNE Remand Order") and the FCC's Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98 (FCC 99-355) (rel. December 9, 1999) ("the Line Sharing Order"), specifically vacated the Line Sharing Order, and remanded both these orders to the FCC for further consideration in accordance with the decision. In addition, on November 24, 1999, the FCC issued its Supplemental Order *In the Matter of the Local Competition Provisions of the Telecommunications Act of 1996*, (FCC 99-370) and on June 2, 2000, its Supplemental Order Clarification, (FCC 00-183), in CC Docket 96-98. By executing this amendment, Pacific Bell Telephone Company does not waive any of its rights, remedies or arguments with respect to any such decisions or proceedings and any remands thereof, including its right to seek legal review or a stay of such decisions and its rights contained in the Interconnection Agreement. Pacific Bell Telephone Company further notes that on April 27, 2001, the FCC released its Order on Remand and Report and Order in CC Dockets No. 96-98 and 99-68, *In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-bound Traffic* (the "ISP Intercarrier Compensation Order"), which was remanded in *WorldCom, Inc. v. FCC*, No. 01-1218 (D.C. Cir. 2002). By executing this Amendment and carrying out the intercarrier compensation rates, terms and conditions herein, Pacific Bell Telephone Company does not waive any of its rights, and expressly reserves all of its rights, under the ISP Intercarrier Compensation Order, or any other regulatory, legislative or judicial action, including but not limited to its right to exercise its option at any time in the future to invoke the Intervening Law or Change of Law provisions and to adopt on a date specified by Pacific Bell Telephone Company the FCC ISP terminating compensation plan, after which date ISP-bound traffic will be subject to the FCC's prescribed terminating compensation rates, and other terms and conditions.